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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 765 59

TRANSIT ADVERTISERS, INC.,
Respondent,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, N. Y. C.

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

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To the Honorable the Chief Justice and Associate Justices of the United States:

Petitioner prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 12, 1952.

Opinions Below.

The opinions of the District Court (R. 259-264, 265-281) are unreported. The opinion of the Court of Appeals (R. 655-665) is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 12, 1952 (R. 666-667). A petition for rehearing in the Court of Appeals (R. 668-678) was filed on March 26, 1952. Rehearing was denied by an order of the Court of Appeals dated April 14, 1952 (R. 680-681). On April 18, 1952 the Court of Appeals stayed its mandate for thirty days pending petitioner's application for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented.

1. Where jurisdiction is based upon diversity of citizenship, must a federal court follow the conflict of laws rules of the forum as to the Statute of Frauds?

2. Where jurisdiction is based upon diversity of citizenship, must a federal court, when interpreting the Statute of Frauds of a state, regard the decisions of that state as the rules of decision?

3. In a federal declaratory judgment action, where jurisdiction is based upon diversity of citizenship, and the action involves the Statute of Frauds of a state, does *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, control notwithstanding the Rules of Decision Act, Federal Declaratory Judgment Act and Rule 57 of the Federal Rules of Civil Procedure?

4. Did the court below correctly apply the law of Connecticut in the interpretation of the Connecticut Statute of Frauds?

Statutes Involved.

The pertinent provision of the Connecticut Statute of Frauds is as follows:

> "No civil action shall be maintained . . . upon any agreement that is not to be performed within one year from the making thereof, unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent . . ." Conn. Gen. Stat. §8293 (1949).

The Rules of Decision Act (28 U. S. C., Section 1652) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Federal Declaratory Judgment Act (28 U. S. C., Section 2201) provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Rule 57 of the Federal Rules of Civil Procedure provides:

> "The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Statement of the Case.

Plaintiff, the Respondent in this Court, brought this action for a declaratory judgment. The complaint alleges that on or about June 7, 1948, plaintiff and defendant entered into an agreement giving plaintiff the exclusive right to solicit and obtain contracts for advertising to be displayed on property of the defendant (R. 4; par. 5); that a writing setting forth the terms of the oral agreement was signed by the defendant (R. 5; par. 7); and that a dispute has arisen between the parties as to the existence of a valid contract (R. 5; par. 9).

The answer denies an oral agreement and that a writing setting forth the terms thereof was signed by the defendant (R. 20; par. 2). The answer pleads that the alleged agreement was not to be performed within one year and that no note or memorandum

thereof in writing was subscribed by the defendant (R. 20; par. 6).

The trial court granted a declaratory judgment in favor of the plaintiff (R. 635-636). The United States Court of Appeals for the Second Circuit affirmed the judgment and remanded the cause only for recomputation of damages if necessary (R. 666-667). Defendant petitioned for rehearing, which the court below denied (R. 679).

The plaintiff's complaint relied solely upon a writing dated August 9, 1948 as a sufficient memorandum (R. 5; pars. 6, 7, 10). It was upon this theory that the case was tried, and the District Court found and concluded that the writing of August 9 alone was a sufficient memorandum (R. 273, 274). The trial judge considered a letter of June 7, 1948 only upon the question of whether an oral agreement had been made on that date (R. 259-260). The argument that the two writings might be considered together was advanced for the first time by the plaintiff after defendant filed its brief before the Court of Appeals.

The opinion of the Court of Appeals says "that it may fairly be inferred . . . that the writing of August 9 conformed to the agreement of June 7 mentioned in the memorandum of that date" (R. 660). An examination of the writing of August 9 shows that it does not refer to the oral agreement, fails to show that any agreement had been made, was not an admission of a previous contract or of any terms thereof.

The trial court found that the writing of August 9 was signed by a Vice-President of the defendant on August 10, 1948, that within approximately one hour

after subscription he drew a line through his signature in order to revoke and cancel his signature (R. 260, 271, 273). The trial court concluded that this signature satisfied the Statute of Frauds (R. 278-279) and that the subsequent crossing out of the signature did not impair or affect its efficacy (R. 279). The District Court also found that the writing of August 9 was never delivered to plaintiff (R. 260) but concluded that it satisfied the Statute of Frauds even though never delivered (R. 277).

Specification of Errors.

The United States Court of Appeals for the Second Circuit erred:

1. In holding that the oral contract is valid and enforceable.

2. In failing to apply the rule of conflict of laws of New York.

3. In failing to apply the Connecticut law to determine whether the oral contract is valid and enforceable under the Connecticut Statute of Frauds.

4. In affirming the judgment of the District Court except as to the amount of damages.

Reasons for Granting the Writ.

1. The decision of the court below is in conflict with decisions of the Supreme Court of Errors of Connecticut.

(a) The decision is directly in conflict with the decisions of the Supreme Court of Errors of Connecticut in *Devine* v. *Warner,* 76 Conn. 229 (1903), and *Mitchell* v. *A & B Coal Co.,* 133 Conn. 573 (1947), in holding that two unconnected writings may be taken together as a sufficient memorandum of an oral agreement.

In its opinion the court below considered a letter of June 7 from Doolan to Palmer along with the draft of contract of August 9 and held that these two writings together constituted a memorandum sufficient for the Statute of Frauds (R. 658-660). The letter of June 7 refers to an oral agreement, the draft of August 9 does not refer to an oral agreement, and neither document refers to the other.

The opinion says (R. 659):

> "Surely another writing signed by the party to be charged which identified the writing claimed to be such as a memorandum of the contract would suffice, for it is not essential that the entire memorandum be signed at the same time."

The writing of June 7 does not identify the writing claimed to be a memorandum of the contract. In *Burns* v. *Garey,* 101 Conn. 323 (1924), to which the opinion refers (R. 659), both writings were on the same piece of paper although part had been added after signing. All the writing was clearly part of

the same transaction and parol evidence was not needed to connect the two parts of the memorandum.

In *Devine* v. *Warner, supra,* the Supreme Court of Errors approved a charge in part as follows:

> ". . . But it [the memorandum] must all be collected from the writings, provided the several writings are so connected by mutual reference or otherwise that there can be no uncertainty as to the meaning and effect of them all when taken together and viewed as a whole, but this connection of the several writings cannot be established by oral testimony offered to supply any defects or omissions in the written evidence" (76 Conn. at p. 233).

In *Mitchell* v. *A & B Coal Co., supra,* the court refused to permit several writings to be read together "because the contract signed by the defendant refers to no other document in such terms that it can be identified" (133 Conn. at pp. 576-577), citing Connecticut cases.

(b) The decision of the court below is also directly in conflict with the decision of the Supreme Court of Errors of Connecticut in *Mitchell* v. *A & B Coal Co., supra,* 133 Conn. 573 (1947), in holding that a memorandum may satisfy the Statute of Frauds without reference to an oral agreement.

The opinion relies upon the sufficiency of the August 9 memorandum. It says (R. 658-659):

> "The decisive question is whether the writing signed by the vice-president of the defendant is admissible proof of the oral contract. It did not

expressly refer to the oral agreement and it has, indeed, been held that such a recital is essential to satisfy the statute. *Lowther* v. *Potter,* 197 Fed. 196, aff'd, 6 Cir., 221 Fed. 881. But we think this view loses sight of the fact that the statute is silent as to any such reference. It requires only that the writing signed actually be such a memorandum of the oral contract that it shows what the contract was. An express reference in the writing serves to help show that but it is not the only evidence permissible."

In *Mitchell* v. *A & B Coal Co., supra,* the opinion says (p. 576):

"It does not . . . even show that any agreement at all had been made at the time the memorandum was signed."

(c) The decision of the court below is also in conflict with the decision of the Supreme Court of Errors of Connecticut in *Schempp* v. *Beardsley,* 83 Conn. 34 (1910), in holding that the memorandum was effectively signed by the party to be charged.

The opinion of the Court of Appeals says (R. 660):

"Nor can the defendant's contention be sustained that the writing was made ineffective as a memorandum of the oral agreement by the crossing out of its vice-president's signature after it had been affixed. The signature was intended to signify his approval of it, with complete understanding of the nature and contents of the document being signed, as a memorandum of the previous oral agreement. As soon as he did sign under such circumstances, written evidence of the oral contract came into existence which took

that contract out of the statute of frauds. *Handy* v. *Barclay,* 98 Conn. 290, 119 Atl. 227. Subsequent cancellation of the signature was but evidence that the oral contract of which the writing was a memorandum had been repudiated but it did not alter the fact that a memorandum had been signed which, when signed, made the statute of frauds inapplicable to the previous oral contract. It was as effective as evidence that the previous oral contract had been made and indicative of the terms of that contract after the signature was crossed out as it was before."

The case of *Handy* v. *Barclay, supra,* 98 Conn. 290 (1922), merely says (p. 295) that a memorandum may be made and signed after an oral agreement is made. The document did not satisfy the Statute because it failed to contain the amount of rent or the terms of its payment.

In *Schempp* v. *Beardsley, supra,* an oral agreement was put in writing and signed but later only fragments of the paper were found. These fragments were "not enough to form a memorandum in writing which would avoid the effect of the statute of frauds" (p. 36), even though the court knew that the memorandum when signed contained the terms of the oral agreement. The case clearly contemplates the possibility of destruction of a writing, or cancellation of a signature, before notice to the other party.

(d) The decision of the court below is also directly in conflict with the decision of the Supreme Court of Errors in Connecticut in *Garber* v. *Goldstein,* 92 Conn. 226 (1917), in holding that delivery of the memorandum was not necessary.

The opinion says (R. 660-661):

> "Delivery of the signed memora[ndum] is not necessary to make it effective as ev[idence of the] previous oral contract unless, by its terms, the oral contract is not to be consumm[inated until a] memorandum has been delivered. Absent that condition upon the binding effect of [the oral con]tract, non-delivery does not affect [the probative] value of the signed memorandum t[o satisfy the] requirements of the statute of frau[uds."

Reference is made to *Jacobson* v. *H[endricks,* 83 Conn. 120 (1910). In this last case the] the writings inadequate to show consent[court found] of the principals. The issue of deliv[nt on the part] involved. [ivery was not

On the other hand, in *Garber* v. *Gol[dstein, supra,* the trial court had charged the jury that] issue was whether a lease had been made[t the principal] found the instrument had been signed[le, and if they] defendant and *delivered to the plaintiff,*[d by the de-] execution of no more formal instrume[and that the] templated, then the instrument was a[ient was con-] (p. 228). The Supreme Court of Error[a valid lease] charge erroneous in that the parties mig[rs found this] templated a more formal instrument, a[ght have con-] intended the instrument to be one of[and still have] ordered a new trial without criticism of[f letting. It] the charge which related to delivery.[that part of

2. The decision of the court below, in failing to apply the applicable law, is in conflict with the decisions of this Court.

The court below deemed it unnecessary to apply the rule of conflict of laws of New York on the theory that the Statute of Frauds of the State of New York and of the State of Connecticut reach the same result (R. 658).

It should have applied the conflict of laws rule of New York. "We are of opinion that the prohibition declared in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, against such independent determinations by the federal courts, extends to the field of conflict of laws." *Klaxon* v. *Stentor Co.,* 313 U. S. 487, 496 (1941). Under the conflict of laws rule of New York, the Statute of Frauds of Connecticut and not of New York is determinative of the issues. *Franklin Sugar Refining Co.* v. *Lipowicz,* 247 N. Y. 465 (1928).

The court below should have applied not only the Connecticut statute but should have looked to the decisions of its courts with respect to the interpretation of the statute. The state courts speak with final authority. The result of the decision is that plaintiff has obtained a favorable judgment by suit in a United States Court without regard to the applicable law. Petitioner is entitled to have an adjudication of its rights under the Connecticut Statute of Frauds and Connecticut decisions.

Even doubt as to what the Connecticut law might be does "not free the federal courts from the duty of deciding questions of state law in diversity cases."

Meredith v. *Winter Haven*, 320 U. S. 228, 237 (1943). Petitioner was "entitled to have such an adjudication" (*ibid.* p. 238). The federal courts must apply any rule of state law which would have a substantial effect upon the outcome of a case. *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945); *Angel* v. *Bullington*, 330 U. S. 183 (1947).

3. **Whether a federal court in a diversity case may resort to general law where a generally uniform state statute is involved presents an important question of federal law which has not been, but should be, determined by this Court.**

The Court of Appeals seems to have followed the thought of Judge Learned Hand in *New York, N. H. & H. R. Co.* v. *Reconstruction Fin. Corp.*, 180 F. (2d) 241 (C. C. A. 2d 1950), to the effect that a statute of general adoption is a source of federal law. See 64 *Harv. L. Rev.* 342-343 (1950). This declaratory judgment action involves private litigants and is not similar to a suit of the United States on commercial paper governed by federal rather than local law. *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363 (1943).

Erie R. Co. v. *Tompkins, supra*, 304 U. S. 64, included the judicial process by the highest court of a state as applicable in the determination of state substantive law. Indeed, lower federal courts must follow inferior state courts if the highest state court has not passed on an issue, so important is uniformity. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940).

ion under the

4. Whether a federal court in an act d by the rule **Federal Declaratory Judgment Act is bou** nt question of **of *Erie R. Co.* v. *Tompkins* is an importa** ld be, decided **federal law which has not been, but shou by this Court.**

tion is for a

Another question arises where the ac diction is ac- federal declaratory judgment and juris federal court quired by diversity of citizenship. Is a decisions to then bound to follow state statutes and able contract determine whether a valid and enforce another way, existed between the parties? To put it ral only and is a federal declaratory action procedu *supra,* 304 unaffected by *Erie R. Co.* v. *Tompkin* U. S. 64?

l Declaratory

The Rules of Decision Act, the Federa eral Rules of Judgment Act and Rule 57 of the Fed and 4 of this Civil Procedure are set out at pages 3 petition.

not hitherto

This presents an important question nty Trust Co. decided by this Court. Neither *Guaran* v. *Bullington,* v. *York, supra,* 326 U. S. 99, nor *Angel* r. *supra,* 330 U. S. 183, provides the answer

Conclusion.

mpression and

This case involves matters of novel im n of the rule of importance in the future applicatio v. *Tompkins.* laid down by this Court in *Erie R. Co.*

A writ of certiorari should be granted to resolve a direct conflict between decisions of the highest court of Connecticut and the Court of Appeals for the Second Circuit. The questions in issue in this case as well as the principles involved warrant review by this Court.

Respectfully submitted,

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New York, N. Y., May 12, 1952.